

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
<http://www.montgomerycountymd.gov/boa/>  
(240) 777-6600

**Case No. A-6634**

**PETITION OF ALEX W. KUZEMKA**

OPINION OF THE BOARD

(Hearing Held: October 23, 2019)

(Effective Date of Opinion: November 5, 2019)

Case No. A-6634 is an application by Alex W. Kuzemka (the "Petitioner") for a variance from the requirement in Section 59-4.4.6.B.2.c of the Zoning Ordinance that accessory structures be located behind the rear building line of the principal building. The Petitioner is seeking to locate a detached garage on his property.

The Board of Appeals held a hearing on the application on Wednesday, October 23, 2019. Petitioner Alex M. Kuzemka appeared at the hearing in support of the application.

Decision of the Board:                      Variance **GRANTED**.

**EVIDENCE PRESENTED**

1. The subject property is Lot 3, Block 2, Paint Branch Farms Subdivision, located at 706 Notley Road, Silver Spring, MD, 20904, in the RE-1 Zone (the "Property"). It was platted in 1937. See Exhibit 1.
2. The subject Property is a rectangular in shape, and fronts on an unbuilt, paper street ("Somerset Lane") along its north side. The subject Property borders Lots 8 and 9 to the south, Lot 2 to the west, and Lot 4 to the east. Access to the Property is from the south, via an easement across Lot 8. The subject Property is addressed on Notley Road, and the house on the subject property faces Notley Road. See Exhibits 3, 4(a), and 5(g).
3. The Property's northern lot line, which borders the unbuilt Somerset Lane, is considered for zoning purposes to be the Property's front lot line, despite being to the

functional rear of the house. The Property's southern lot line is considered, again for zoning purposes, to be the Property's rear lot line, despite being the functional "front" of the Property relative to Notley Road. The Property's east and west lot lines are both considered side lot lines.

4. The Petitioner is seeking to construct a detached garage. Compliance with the restriction that accessory structures cannot be located forward to the rear building line would require that the proposed garage be located between the existing house and its southern lot line, between the Petitioner's house and Notley Road, in what functions as the Petitioner's "front" yard. See Exhibit 3.

5. The Petitioner's Statement of Justification ("Statement"), in the record at Exhibit 3, states that the location for the proposed garage "has been selected because of its relationship to the existing house on lot 3, its ample distance from adjoining properties, and its ability to avoid unnecessary tree removal and grading elsewhere on the lot. It also avoids having the accessory building totally in front of the existing house on lot 3." The Statement also notes that locating the proposed garage as required by the Zoning Ordinance would "effectively block views to and from the front of the house and result in a garage in the effective front yard," would "place that building closer to homes on Notley Road," and would "require both grading changes and tree removal" whereas allowing construction in the proposed location would utilize "[a]n existing retaining wall on the property [that] provides a level, open area for construction...."

The Statement indicates that all of the properties that border the south side of the unconstructed "Somerset Lane" have access on Notley Road, which parallels Somerset Lane to the south, and all the properties that border the north side of "Somerset Lane" have access on Orchard Way, which parallels Somerset Lane to the north. See Exhibits 3 and 7(a). Accordingly, the Statement notes that "this street and neighborhood have created a pattern with the homes [on the south side of Somerset Lane] facing Notley Road," and that the proposed location of the garage "conforms with this pattern." The Statement further notes that the platting of the Property pre-dates the Petitioner's ownership, and that "[t]hrough no fault of its own, Somerset Lane was never constructed and the orientation of this house with its access on Notley Road are not the result of actions by the applicant."

The Statement describes the proposed location of the proposed garage as the "most appropriate location for this property given the orientation of the existing house, topography of the lot, existing tree cover, and relationship to surrounding properties. Approving this garage which is partially in the legal rear yard, but at the same time, relates appropriately to the existing house, is the minimum necessary. Other locations would have adverse effects." The Statement states that granting the requested variance would not impair any Master Plan objectives, and would not be adverse to the use and enjoyment of abutting or confronting property owners since any other location on the Property would involve the removal of trees or additional grading. See Exhibit 3.

6. At the hearing, the Petitioner testified that he is trying to construct a garage on an existing, approved 27' by 43' pad site. He testified that the front of his property for zoning purposes is on the un-built Somerset Lane, but that the functional front is towards Notley Road. In response to a Board question asking why he cannot move the proposed garage closer to Notley Road, to eliminate the need for a variance, the Petitioner testified that the property drops about five feet down towards a swale, and that the area would need to be filled if the garage were located there. He testified that there is currently a retaining wall on three sides of the existing pad because of the slope on the property. Finally, he testified that the property has significant tree cover which would have to be disturbed if the garage were located elsewhere, as shown on the aerial photograph in the record at Exhibit 5(g).

## FINDINGS OF THE BOARD

Based on the Petitioner's binding testimony and the evidence of record, the Board finds that the variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59-7.3.2.E as follows:

1. *Section 59-7.3.2.E.2.a - one or more of the following unusual or extraordinary situations or conditions exist:*

*Section 59-7.3.2.E.2.a.i. - exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;*

The Board finds that the subject property contains significant topographical conditions which necessitate the use of retaining walls and limit the area available for construction of the proposed accessory structure. The Board finds that this is an extraordinary condition which satisfies this element of the variance test. In addition, the Board notes as an aside that the subject property fronts on a paper street and is accessible only via easement, and that while this condition is shared with neighboring properties, it has the effect of undermining the presumptive intent of the locational restrictions of the Zoning Ordinance.

2. *Section 59-7.3.2.E.2.b. the special circumstances or conditions are not the result of actions by the applicant;*

The Board finds that the Petitioner is not responsible for the topography of the subject property, which was platted in 1937, nor is he responsible for its location on an unbuilt street.

3. *Section 59-7.3.2.E.2.c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*

Based on the testimony of the Petitioner, the Board finds that the proposed accessory structure will be located in the portion of the property that is most appropriate given the property's topography and tree cover, and that placement of the proposed

structure in a fully compliant location, in the functional "front" of this property, would require tree removal and regrading, and would constitute a practical difficulty for the Petitioner. Thus the Board finds that the grant of the requested variance, to allow an accessory structure forward of the rear building line, is the minimum necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would entail.

4. *Section 59-7.3.2.E.2.d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and*

The Board finds that the requested variance to allow the location of the proposed accessory structure forward of the rear building line will continue the residential use of this home and thus can be granted without substantial impairment to the intent and integrity of the White Oak Master Plan (1997).

5. *Section 59-7.3.2.E.2.e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

Based on the Statement and the testimony of the Petitioner, the Board finds that allowing the construction of the proposed accessory structure forward of the rear building line, on an existing pad site, will avoid the need for re-grading and for the removal of trees, thus minimizing the impact of this construction on neighboring property owners. Thus the Board finds that the grant of this variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Accordingly, the requested variance to allow construction of an accessory structure forward of the rear building line is **granted**, subject to the following conditions:

1. Petitioner shall be bound by the testimony and exhibits of record, to the extent that such testimony and evidence are mentioned in this opinion.

2. Construction shall be in accordance with Exhibits 4(a)-(b) and 5(a)-(f).

Therefore, based upon the foregoing, on a motion by John H. Pentecost, Chair, seconded by Jon W. Cook, with Katherine Freeman and Mary Gonzales in agreement, and with Bruce Goldensohn, Vice Chair, necessarily absent, the Board adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

  
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John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 5th day of November, 2019.

  
\_\_\_\_\_  
Barbara Jay  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-7.3.2.G.1 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.